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**THE ALLOCATION OF LIMITED AUTHORIZATIONS IN SPAIN: CONSIDERATIONS FROM THE  
ANALYSIS OF THREE SPECIFIC SECTORS\***

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**ABSTRACT:** This contribution is intended to provide an overview of the Spanish regime of allocation of one of the main types of limited public rights: limited authorizations. With this target, it is examined the current legal regime of three specific sectors of administrative law, namely the rules on the allocation of gambling licenses, of entitlements for the use of radio frequencies as well as of greenhouse gas emission permits. It will be shown that despite their different object and the fact that only the two last areas have been subjected to European harmonization, the three analyzed sectors are crossed by some horizontal or structural common elements regarding the allocation of limited authorizations. The identification and analysis of such structural elements are of interest in terms of general administrative law in so far as they are traceable to abstract elements of a general system of allocation of any limited authorization.

**KEYWORDS:** Limited public rights, limited authorizations, concessions, Spanish administrative law, radiofrequencies, gambling licenses, emission permits, allocation systems, administrative procedures, Services Directive.

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## I. INTRODUCTION

1. The aim of this paper is to provide an overview of the Spanish regime of allocation of limited public rights through the systematic exposition of its regulation in three specific sectors of the administrative activity: gambling licenses, entitlements for the use of radio frequencies and greenhouse gas emission permits.
2. The three mentioned policy areas constitute clear examples of the attribution of limited authorizations by administrative authorities. In this paper, the term *limited authorizations* is used in its broadest sense, as one of the main types of limited public rights, and it address to any administrative decision that makes an exception limited in number to a statutory prohibition or injunction. Thus, the term covers here any entitlement granted with the referred purpose by an administrative body: licenses, permits, allowances, or authorizations in the narrow sense. Concessions are also included among these figures, with the peculiarity that in Spanish law they constitute the mandatory entitlement for the private occupation of a public good (*concesiones de dominio público*) or for the managing by private operators of a public service which has been reserved to the public authorities (*concesiones de servicio público*). Both kinds of concessions attribute the entitled person, selected through a competitive procedure, the exclusive right to economic exploitation of the good or activity for a limited time, after which the facility reverts for free to the Administration itself.
3. The analysis of the system of allocation of limited authorizations in concrete policy areas can be of interest in order to build a general theory on limited public rights, since such specific areas operate as reference fields (*Referenzgebiete* in the German legal terminology) for the construction of institutions of general administrative law. In this sense, it will be shown that it is possible to identify, in each of the selected sectors, certain structural elements that are traceable to abstract elements of a general system of allocation of any limited authorization.

4. With this target, it will first be exposed the Spanish regime of allocation of limited authorizations in the three alluded sectors (§ II), distinguishing between those which are just regulated at a national level given the absence of European harmonization (§ II.1) and those whose regulation responds to secondary EU law (§ II.2). Thereafter the horizontal or structural elements that cross the exposed legal regimes will be highlighted (§ III).

## **II. THE ALLOCATION OF LIMITED AUTHORIZATIONS IN SPAIN: THREE EXAMPLES**

### **A. Allocation in case of lack of harmonization at a European level: the gambling industry<sup>1</sup>**

5. In Spain, the gambling activity was monopolized by the State until 1977, moment up to which there only existed the ‘National Lottery’ as well as weekly sports betting based on the results of football’s league matches. From 1977 it was opened the possibility for private companies to operate in this sector, by obtaining an administrative authorization either for the opening of casinos or, in a much less restrictive manner, for the installation of the so-called ‘slot machines’ in bars and cafes.
6. The picture has changed substantially in the last decade, due to the increasing accessibility to the Internet by the public, circumstance which has led to improved possibilities for the online gaming industry, especially with regard to sports betting and poker. In the absence of a general legal framework for online gaming at the State’s level, there has been until 2011 a factual situation of freedom, in which about 2,000 companies have developed their gambling activity in Spain, some of them having a special social visibility.

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<sup>1</sup> For a comprehensive analysis of the current legal framework for gambling in Spain see O. Herráiz Serrano (coord.), *El nuevo régimen jurídico de los juegos de azar: comentarios a la Ley estatal 13/2011, de regulación del juego* (La Ley, Madrid 2012).

7. Finally, the Spanish legislator passed the Law 13/2011, of 27 May, on Gambling (*Ley del Juego*, hereinafter LJ), which sets a regulatory framework both for online gambling and for certain traditional offline games, in so far as they are developed statewide. These two major types of gambling activity are subjected to a different legal regime. The purposes of the law are the safeguard of public order, the protection of the rights of under-aged and players, the fight against fraud and the prevention of addictive behaviors [Article 1 LJ].
8. Regarding traditional offline games, the LJ regulates specifically the statewide lottery, establishing that its exercise is reserved for certain entities designed by the Law itself. According to the First Additional Provision of the LJ, such entities are the *Sociedad Estatal Loterías y Apuestas del Estado* and the *Organización Nacional de Ciegos Españoles*. To operate lotteries, these entities require only the obtainment of the corresponding administrative authorization by the Ministry of Economy and Finance [Article 5 LJ].
9. With regard to online gambling (the one developed by electronic, interactive or telematic means), the games covered by the LJ are betting, raffles, contests and other games that involve a risk of patrimonial values, as well as their publicity, promotion or sponsorship. These games are not reserved, but neither are they free: their exercise is subject to the previous obtainment of an entitlement, which can take the form of an authorization or a license [Article 9(1) LJ]. Gambling operators that do not meet this requirement are strictly prohibited and punishable [Article 9(2) LJ]. The procedure for the obtainment of the alluded entitlements is regulated in the Royal Decree 1614/2011, of 14 November, of development of the LJ concerning licenses, authorizations and registers.
10. The required entitlement will take the form of an administrative authorization when it refers to the development of online games with occasional character. The number of authorizations to grant is unlimited,

and they will be granted by an administrative body created by the LJ (the National Gaming Board or *Consejo Nacional del Juego*, CNJ), in the term of one month from the receipt of the application. Beyond this deadline, if the CNJ has not given a response, the authorization should be considered as denied [Article 12 LJ].

11. The entitlement will have the form of a license when it refers to the operation of online games without occasional character. There are two types of licenses: general and singular ones.

12. General licenses, regulated in Article 10 LJ, authorize their holder to conduct gambling activities. They are granted by the CNJ following the mandatory administrative procedure, which should comply with the principles of publicity, concurrence, equality, transparency, objectivity and non-discrimination. Although this provision seems to suggest the contrary, the general principle is the unlimited number of general licenses to grant. The call of the procedure shall determine the criteria for the granting of the licenses, among which it is possible to include the experience of the tenderers, their solvency or their availability of means for the exploitation of the license. To obtain a general license it is necessary to be a limited company or *sociedad anónima*, and to have the gambling activity as sole purpose. Once expired the period of six months without specific resolution by the Administration, the license will be considered as granted (positive silence). If granted, the general license is valid for ten years, renewable for periods of another ten.

13. By exception, it is possible to set a limit to the number of general licenses to grant only when the administration deems it necessary to size the gambling supply or to limit the number of operators in order to protect the public interest, the rights of under-aged, or to prevent gambling addiction phenomena [Article 10(5) LJ]. The duration of general licenses in case of limitation of their number is also of ten years. Nevertheless, their renewal after such a period will not take place: they should be reassigned by the Administration if the requirements established in

Article 10(6) LJ are met, i.e. if there is a third party interested in obtaining the license, who made a requirement at least twenty four months before the expiration date, and who demonstrates to comply with the requirements that were considered for the granting of the license to the previous holder.

14. Once a gambling company has been granted a general license, it needs to obtain a singular license for the exploitation of each concrete game included in the scope of the general one [Article 11 LJ]. Singular licenses are granted by the CNJ respecting the principles of transparency, objectivity and non-discrimination, and they should be proportionate to the purposes of protecting public health, under-aged and dependents, and of prevention of fraud, money laundering and terrorist financing. The singular licenses will have a minimum duration of one year and maximum of five, and they will be renewable for successive periods of the same duration.
15. None of the entitlements regulated in the LJ can be transferred nor operated by third parties. By exception, the authorizations or licenses may be transferred after allowance of the CNJ in cases of fusion, excision or contribution of industry motivated by company restructuring [Article 9(3) LJ]. The entitlements granted by other Member States of the EU will not be valid in Spain [Article 9(4) LJ], and the ones granted in Spain should get registered in the General Register of Gaming Licenses (*Registro General de Licencias de Juego*) created by Article 22 LJ.
16. The first administrative procedure for the granting of both general and singular licenses was opened in November 2011, setting a deadline of a month for the submission of applications. The applicants had to be registered in any State of the EU (Malta, in most cases). It was provided that the administrative procedure could take up to six months –this means, May 2012–, to enable the Administration to verify the applications, particularly regarding the technical systems to be used, the financial solvency of the applicant and the means to prevent money



laundering. The call of the procedure did not foresee a limitation of the number of licenses to grant. This first procedure was finished in June 2012, when a total amount of 91 general licenses was granted to 53 operators. At the same time they were granted 186 singular licenses, most of them for the operation of poker games, bingo, roulette and blackjack. Once the first licenses were granted, the system of violations and penalties of the LJ began to be applicable; until that moment the companies acting without license were not properly in lawlessness, but in a kind of official tolerance of an illegal situation. However, the tax regime of the LJ plenty applies from the entry into force of the Law, imposing the payment of a special tax of twenty five percent of the profits obtained in Spain to gambling companies whatever their domicile tax is.

**B. Allocation in case of full harmonization at a European level:  
radiofrequencies and greenhouse gas emission permits**

**1) Radio frequencies<sup>2</sup>**

17. The Spanish regulatory framework for the allocation of radio frequencies, both for telecommunications and broadcasting, is composed by the State's Telecommunications Act (Law 32/2003, of 3 November, *General de Telecomunicaciones*, hereinafter LGTel) and the Royal Decree 863/2008, of 23 May, which approves the Regulation of development of LGTel concerning the usage of the radio electric spectrum (RD 2008).

18. The above mentioned framework is chaired by three structural ideas. First, in Spanish law the radio spectrum is configured as a public good or *bien de dominio público* [Article 43(1) LGTel]. In Spain, public goods are characterized by their public ownership and their submission to a special regime of administrative law. Thus, the spectrum's character of state-owned public good prevents it from being subject of any kind of private

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<sup>2</sup> For further references see M. M. Fernando Pablo, *Régimen jurídico del dominio público radioeléctrico* (Comares, Granada 2009).

property [Article 132(1) of the Spanish Constitution of 1978, *Constitución Española*], so that individuals and undertakings can, at best, hold rights of use over it. Second, the allocation of such rights of use is articulated in Spain through an administrative model (command-and-control approach), and thus the Government is addressed with the responsibility of managing the spectrum and granting the rights for its use [Article 43(2) LGTel]. Finally, Article 5(1) LGTel establishes that the provision of broadcasting and telecommunication services is not subject to administrative authorization, but free, requiring only the submission of prior notification to an administrative body, the Commission for the Telecommunications Market (*Comisión del Mercado de las Telecomunicaciones*, CMT). Thereby the obtainment of spectrum usage rights is the sole constraint for the development of such activities.

19. At the same time, the Spanish provisions on radio spectrum are expressly submitted to the general principles of planning, efficiency and effectiveness, transparency, competition and neutrality of technologies and services [Articles 3 LGTel and 2, 4, 7 and 8 RD 2008].
20. The alluded Spanish framework includes three possible types of use of the spectrum, which basically correspond to those traditionally allowed for any public good (common, special and privative use). Each of these uses is subject to a different legal regime.
21. The common use of the spectrum, defined in Article 11 RD 2008, is free and does not require the obtainment of any legal entitlement [Articles 45(1) LGTel and 11(4) RD 2008].
22. The special use is defined in Article 12 RD 2008, and it requires the obtainment of a prior individual administrative authorization, whose granting's criterion is the priority in the submission of applications [Articles 45(2) LGTel and 13(2) RD 2008].

23. As for the privative use of radio spectrum, in the absence of any definition in the LGTel nor in the RD 2008, it is necessary to refer to the Spanish general legal framework for public goods contained in Law 33/2003, of 3 November, on the Public Goods of Public Administrations (*Ley de Patrimonio de las Administraciones Públicas*, LPAP), whose Article 85(3) defines the privative use as the use that determines the occupation of a portion of public domain, thus limiting or precluding its use by others. In accordance with Articles 45(2) LGTel and 18(1) RD 2008, the privative use of radio spectrum requires the previous obtainment of an entitlement administrative decision. This will take the form of an administrative authorization, a demanial affectation (*afectación demanial*) or an administrative concession [Article 44(1) LGTel]. In any case, the granted rights for the privative use of the spectrum may be used only to provide the services specified in the entitlement, whose violation constitutes a cause for its revocation [Articles 16 and 28 RD 2008].

24. In case of self-provision of services by the applicant, the entitlement will have the form of an individual administrative authorization if the applicant is not a public Administration, case in which the title will take the form of a demanial affectation (legal figure by which a public good is declared affected to certain public purposes), according to Articles 45(2) LGTel and 18(2) RD 2008. None of the two mentioned figures will be applicable in those cases where demand exceeds supply or where it is necessary to articulate a tender procedure in the terms which will be discussed below.

25. In all other cases than previously expressed –i.e. when there is not self-provision of services, when demand exceeds supply or when the law requires the celebration of a tender procedure–, the entitlement will take the form of an administrative concession [Articles 45(2) LGTel and 18(3) RD 2008].

26. The general principle in Spanish law with respect to administrative concessions is their allocation through competitive procedures, unless

the legislator expressly prescribes that the grant will be direct [Article 93(1) LPAP]. This rule is reversed in the context of concessions of rights for the privative use of the radio spectrum. In the LGTel, the general rule is the direct assignment of such concessions, while its granting through competitive selection procedures is the exception. Apart from the mentioned direct and competitive allocation methods, Chapter III of RD 2008 establishes a differentiated regime for certain specific uses of the spectrum (orbit-spectrum resources, radio and television services, experimental goals and short duration events). In any case, the concessions granted for the privative use of the spectrum should get registered in the Public Register of Concessioners established in Article 8 RD 2008.

27. The exceptional cases in which the LGTel imposes the obligation to hold a tender procedure are those where there is a limitation to the number of concessions to be granted in a specific frequency band; and even in these cases Article 29(2) RD 2008 excludes the application of the tender procedure when such exclusion is necessary for the implementation of international standards or Treaties linking Spain. The establishment of a limitation to the number of concessions to grant is responsibility of the competent Ministry (nowadays, the Ministry of Industry, Energy and Tourism), and must be based on the need to ensure the efficient use of radio spectrum or on the existence of a demand exceeding the supply in certain frequency bands [Articles 44(2) and 45(2) LGTel, Article 29(1) RD 2008]. At the moment, the enumeration of the frequency bands in which the number of concessions to grant is limited is contained in the First Additional Provision to RD 2008. This enumeration should be submitted to review at least every two years [Article 29(4) RD 2008].

28. The tender procedure has its basic features determined by the LGTel, whose Article 44(2) prescribes that the procedure for the allocation of concessions for the privative use of radio frequencies should in any event be in accordance with the principles of publicity, concurrence and non-discrimination, and that it should be solved by the Ministry within a

maximum period of eight months from the invitation to tender. The LGTel remits to the regulatory development the establishment of the provisions regarding the invitation to tender, the bidding terms to be approved and the award of the concession. Making use of this remittal, Article 29(3) RD 2008 regulates the general tender procedure, stating that it should be initiated through a public call to tender specifying the frequency bands to be granted, the term for which they will be assigned, the deadline for submission of applications -which shall not be shorter than a month-, the requirements to be met by the potential purchasers and the allocation procedure.

29. The allocation procedure can be a contest, an auction, or a combination of both, always respecting the principles of publicity, concurrence and non-discrimination [Article 29(3) RD 2008]. In case of choosing the contest, either individually or in combination with the auction, this same provision lays down that the evaluation criteria should be the following: 1) The terms of network deployment and coverage; 2) the amounts to spent on new investment; 3) the number of radio stations to be deployed; and 4) the techniques to allow for a more effective and efficient use of the spectrum. The evaluation of the submitted applications is performed by an allocation board consisting of a minimum of seven members appointed by the Ministry.
30. The granting of rights for the privative use of the spectrum is submitted to the legally established deadline, and the respective rights may be renewed depending on the availability of radio frequencies and the provisions of the spectrum planning. The rights of privative use which are not limited in number will be granted for an initial period of five years, renewable for periods of five years, while the maximum period of validity of concessions limited in number should be determined in the corresponding tender procedure, not exceeding twenty years and being renewable [Article 43(4) LGTel].

31. With regard to the transmissibility of the spectrum, it has to be taken into account that its configuration as public domain excludes all type of secondary market on the spectrum as such. However, the rights granted for its privative use are tradable according to the regime established by the LGTel and the RD 2008. Already in 2003, Article 45(2) LGTel stated that further regulations would establish the conditions whereby the trade with certain rights of use of the spectrum could be possible. In accordance with this provision, Articles 39 to 59 RD 2008 allow two different ways of transmitting the assigned rights of use: the transfer and the cession. The transfer of the right implies the transmission of the entitlement itself, either fully or partially, becoming the receiving party the new holder of the rights and obligations deriving from the entitlement or from the acquired part of it. The cession implies the transmission or lending of the right to use certain frequencies related to the entitlement, which remains the property of the original holder.

32. Both types of transmissions are subject to certain conditions. First, none of them can involve any alteration in the objective scope of the rights and obligations expressed on the original entitlement [Article 39(4) RD 2008]. Second, the new holder of the right of use must meet the conditions imposed to the original one prior to the granting of the entitlement - which is of significant importance in case of concessions granted by means of an administrative contest-, and must comply with the technical conditions existing in the original entitlement, if any [Article 42 RD 2008]. Third, each transfer or cession is subject to prior administrative authorization, without which the transmission would be void [Article 40 RD 2008]. The approval must be granted by the body which was competent for the granting of the entitlement, and the procedure to obtain it is contained in Article 43 RD 2008. In case of transfer of the entitlement, the administrative authorization should be granted in the term of three months, meaning the lack of response after that deadline the denial of the required permit. The same rule applies for the cession of rights for periods longer than six months. In turn, in case of cession for periods shorter than six months, the deadline for the Administration to

decide is one month, and if no resolution has been issued after that period, the authorization must be understood as granted.

33. There are certain exclusions from the possibility of transmitting the rights of use of the spectrum. According to Article 41(1) RD 2008, rights would not be transmissible if they were granted by means of a demanial affectation or a special authorization. Second, Article 41(2) RD 2008 prohibits both the transfer and the cession of rights related to public security, national defence or public service obligations. Third, the possibility of transmission is excluded where it may pose a restriction of the competition in the market, case in which a prior report of the CMT will be requested [Article 41(3) RD 2008]. Fourth, the transmission is not possible if the transferor or the transferee are involved in an administrative proceeding which may result in the withdrawal of the entitlement [Article 41(4) RD 2008]. Finally, the emergence of the so-called spectrum-managers is hampered through the prohibition of the total cession of all the rights of use derived from the entitlement, for the total period of its validity and for all the geographical area for which it was awarded.

## **2) Greenhouse gas emission permits<sup>3</sup>**

34. Concerning the allocation of greenhouse gas emission permits in Spain, it is necessary to distinguish between two periods, each of them corresponding to a different European Directive. The first and current legal regime is governed by Directive 2003/87/EC, while from 2013 a new one, headed by Directive 2009/29/EC, is entering into force.
35. The current Spanish regime of allocation of greenhouse gas emission permits derives from Directive 2003/87/EC, of the European Parliament and of the Council, of 13 October 2003, establishing a scheme for

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<sup>3</sup> For a wider analysis on the implementation of the European emissions trading scheme in Spanish law see M. C. Alonso García, 'El nuevo régimen jurídico del mercado europeo de derechos de emisión de gases de efecto invernadero' (2012) *Justicia Administrativa* (forthcoming).

greenhouse gas emission allowance trading within the Community. This Directive has been implemented in Spain by means of Law 1/2005, of 9 March, regulating the trading of greenhouse gas emission rights. The new legal regime of the European Union Emission Greenhouse Trading Emission, determined by Directives 2008/101/Ce and 2009/29/CE and the Regulation 1031/2010 obliged to modify the Spanish Law. Rules were changed by the Law 13/2010, 5 July. In fact, this law only repeals partially the previous legislation and some of the rules will only enter into force the 1<sup>st</sup> of January 2013. So from now on, we can consider that they are complementary eventhough that from our perspective, that is, the current NAP's the rules to be applied are the ones contained in law 1/2005.

36. According to Directive 2003/87/EC, each Member State must approve a National Allocation Plan (NAP) for the period 2005-2007 and another one for 2008-2012 [Articles 9 and 11 of the Directive]. The NAP is configured as the central element in the allocation of gas emission allowances within the alluded periods: each Plan (NAP I for the period 2005-2007, and NAP II for 2008-2012) sets the total number of allowances to be allocated in Spain. In the NAP I, the allowances allocated were even higher than gas emissions produced in the previous period (2000-2005), while the NAP II has reduced the amount allocated by 16.4% over the previous one. The further reduction of emission allowances in NAP II has taken place on the electricity sector (decreasing of 36.28% compared to NAP I). Each NAP establishes which rules have to be applied to determine the allocations for each facility. It also establishes the existence of a reservation of rights for future facilities and for capacity expansions of existing ones, as well as the rules for managing such a reserve.

37. The procedure for preparing and adopting each NAP was regulated in Article 14 of Law 1/2005, which due to the complexity and relevance of the Plans sets up the obligation of following public information and consultation phases. The NAP I was approved by Royal Decree 1866/2004, of 6 September. It was notified to the European Commission on August 9, 2004. In its Decision of 27 December 2004, the Commission



Considered that some aspects of NAP I were not compatible with Directive 2003/87/EC, urging Spain to amend such aspects, which was made through Royal Decree 60/2005, of 21 January.

38. Regarding NAP II, for its elaboration it was considered desirable to use multiple data source, given the experience acquired with the preparation of NAP I. Among such sources were, for example, the National Inventory of greenhouse gas emissions to the atmosphere, 2006 edition; questionnaires developed by industry associations; the National Register of Emission Rights (*Registro Nacional de Derechos de Emisión* or RENADE); and information provided in public consultation procedures. Finally, NAP II was approved by Royal Decree 1370/2006 of 24 November. Once more, some of its provisions were considered incompatible with Directive 2003/87/EC by the Commission (Decision of 26 February 2007), which resulted in the modification of the NAP II by Royal Decree 1030/2007 of 20 July and by Royal Decree 1402/2007 of 29 October.

39. The proceeding for the individual allocation to each installation is regulated in Article 19 of Law 1/2005, modified by Law 13/2010. The applications must be submitted, for the period of each NAP, before the competent regional body. The request must be made within twelve months before the entry into force of each NAP. Each individual allocation is approved by resolution of the Council of Ministers on a proposal of three Departments of the Spanish Government (Economy and Finance; Industry, Tourism and Trade; and Environment, Rural and Marine Affairs) in a maximum term of three months after the submission of the application. If such a period elapses without response by the Government, the allocation shall be considered as denied. The administrative resolution specifies the amount of allowances assigned to each facility for the period covered by the corresponding NAP and their annual distribution.

40. The method for the allocation of allowances in each period is to be determined in the corresponding NAP. According to Article 17 of Law

1/2005, such method must avoid the existence of unjustified differences that pose an advantage or disadvantage among sectors of activity or among facilities included in the same sector of activity. Moreover, it must be consistent with the technical and economical possibilities of gas reduction in each sector of activity. The individual allocation of emission rights for each industrial facility has not been done through a competitive method, but basing on emissions and historical productions of each facility during the previous period and on the allocation to each industrial sector already determined. Moreover, all allowances have been assigned free of charge in Spain, although Directive 2003/87/EC imposes the free allocation only for a certain percentage of emission rights (at least 95% of them in the period 2005-2007, and 90% in 2008-2012), and thus it would have been possible to allocate a small amount of emission rights through auctions (so in Lithuania, Hungary, Ireland or Denmark). The decision to surrender allowances for free during the alluded periods was a political decision on how to distribute the income generated by the initial allocation of emission rights between producers and consumers.

41. Regarding new entrants, Law 1/2005 provides in its Article 18 the establishment of a reservation of emission rights both for new installations and for upgrades of existing ones. In enforcement of NAP II, the Royal Decree 1370/2006 (amended by Royal Decree 1030/2007 and subsequently Royal Decree 1402/2007) establishes the rights reserved for new entrants in the period 2008-2012, setting the principles and methodologies that should guide the granting of the allowances reserved, which are analogous to that used for existing installations. The allocation to new entrants in the period 2008-2012 aims at the incentive of cleaner technologies. The access of new entrants to the rights of the reservation will be held under the criterion of the order of receipt of applications, taking into account that the allocation request must be made within six months prior to the coming into operation of the facility.
42. The allocated greenhouse emission rights may be subject to transmission among facilities of the European Union, and also among them and

facilities of third States if there is an international instrument by which the rights of the signatory parties are mutually recognized. In any case, the emission rights allocated in Spain may be transferred only if they have been entered into the National Registry of Emission Rights (*Registro Nacional de Derechos de Emisión*), a Registry accessible by the public which was created by Law 1/2005 to guarantee the permanent update and information relating the accountancy and ownership of the allocated emission rights. To purchase this kind of rights, the corresponding facility must also be registered in the National Registry of Emission Rights [Article 21 of Law 1/2005].

43. Both individual allocations (administrative acts), which are formalized as decisions of the Council of Ministers, and Plans (regulations), which define the general criteria for the subsequent allocation, are subject to full judicial review and therefore might be challenged before the Courts. Moreover, as regulations, the NAP can be challenged directly or indirectly (i.e. through an appeal against the subsequent administrative acts based upon the Plan), even though for reasons of legal certainty the estimation of an appeal against a NAP does not determine itself the invalidity of the individual allocations based on it if they have become unappealable. By the beginning of 2012, the Spanish Supreme Court had published more than twenty judgments regarding individual assignments, and only three referring to the Plans (namely to the NAP I; there were not relevant statements about NAP II yet). The low number of judgments relating to the Plans is explained by the fact that their content derives largely from the provisions of the Directive (and though they have to be addressed to the European Court of Justice) and from Law 1/2005 (which cannot be controlled by the Supreme Court but only by the Constitutional Court). The case law of the Supreme Court reveals that the main failure on the implementation of the system in Spain has been the lack of motivation: in a number of judgments the Court has annulled individual assignments because the Council of Ministers did not make explicit the reasons for the allocation of a certain amount of rights; so, among others, the judgments of 23 and 24 September 2008, 9-14-20 July 2010, 8 October 2010, 16

November 2010, 28 December 2010 and 25 January 2011. As stated by the Supreme Court in its judgment of 29 May 2009, both Plans and individual allocations must be properly motivated, being the requirement of motivation applicable with respect to the two phases of assignments in accordance with EU law. Some of the Supreme Court Decisions refers to mistakes in the calculation of the allocation of allowances: 30 September 2008, 1 and 6 October 2008, 3 December 2008, 8 April 2009 and 26 January 2011. Finally, some Decisions refer to the increasing capacity of the undertakings and overallocation of allowances: 27 November 2008, 1-2 and 3 December 2008 and 29 May 2009.

44. Directive 2003/87/EC was amended through Directive 2009/29/EC of 23 April 2009, which improves and extends the greenhouse gas emission allowance trading scheme of the Community. This new Directive has been implemented in Spain by means of Law 13/2010, of 5 July, that modifies Law 1/2005, of 9 March. Through these modifications a new system is established, regarding both the determination of the total number of allowances and the methodology for their allocation. The new legal regime will entry into force from January 1, 2013.

45. One of the main changes in the new system is the disappearance of the NAP. The determinations contained in the Plans until 2013 will from then on be established directly at a European level. The allocation of emission rights in Spain remains within the competence of the Council of Ministers, and the allocation procedure, contained in Article 19 of the modified Law 1/2005, is basically the same than before 2013. Each allocation period is called "trading period" (*periodo de comercio*), and will have a duration of eight years. There will be two ways of allocating greenhouse gas emission permits: the auction and the allocation free of charge.

46. A percentage of the emission rights will continue to be distributed for free by the national government, albeit this allocation system will have a pure transitional character. According to Article 12 of Directive 2009/29/EC, from 2013 the quantity of allowances to allocate for free

will decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027. Pursuant to Article 17 of Law 1/2005 after its amendment by Law 13/2010, the transitional free allocation methodology will be determined by the harmonized standards adopted at European level. Such standards are contained in Decision of the Commission 2011/278/UE. Holders of existing facilities eligible for free allocation of allowances must submit the information and data necessary to calculate the allocation in accordance with the requirements of Decision 2011/278/UE and a methodological report containing a detailed description of how these data have been obtained. The European Commission has developed an electronic form, a methodological report and an explanatory guide for the collection of data. Article 8(1) of the Commission's Decision states that within the data collection process, Member States will only accept data that has been found satisfactory by a verifier, and that the verification process must refer to the methodological report and to the parameters listed in Article 7 and Annex IV of the Decision. The basic rules on the accreditation and verification of gas emissions are contained in Royal Decree 101/2011 of 28 January, whose Article 7 establishes that the check will be conducted by an accredited verifier under the trading scheme allowances, regardless of the scope of their accreditation, which should conform to the provisions of Community rules.

47. The general rule in the new system will be the allocation through auctions. The distribution of the total number of emission rights among the Member States is conducted according to the criteria established in Directive 2009/29/EC. Once the number of rights to be allocated through auctions in Spain has been determined, the organization of such auctions shall be regulated by the Government [Article 14 of Law 1/2005]. Under this Article, such regulation must ensure the principles of free concurrence, publicity, transparency, non-discrimination and efficiency; and it must be guaranteed, in particular, that any facility has a full, fair and equitable access to the auction, and that all the participants have access to the same information at the same time. Moreover, it is

established that the Secretary of State for Climate Change must publish a report on the development of each auction within a period of one month after its celebration, detailing the implementation of the auction rules, the fair and open access of all operators, the transparency on the final decision, the calculation of prices and other technical aspects of the procedure [Article 15 Law 1/2005).

48. In the system applicable from 2013 there is also a reservation of rights for new entrants (the 5% of the total number of emission permits), which is established together for the whole EU [Article 18 Law 1/2005]. From January 1, 2012, emission rights are registered in a unique Union Registry [Article 25 Law 1/2005].

### **III. CONCLUDING REMARKS**

49. It is possible to assert, from what has been exposed, that authorizations have a different legal construction in the three examined sectors: while in case of radio frequencies they consist of an entitlement for the privative use of a public good, they constitute a permission to conduct a socially harmful activity in the scope of greenhouse gas emission permits, and a direct entitlement to pursue an economic activity in case of gambling. Notwithstanding, it is possible to identify some common structural elements among the Spanish regulation on the allocation of these three types of authorizations.

50. First, the problem concerning the limitation to the number of authorizations to grant by administrative authorities shows up in the three analyzed sectors, although with different scope. While in the field of greenhouse gas emission permits the general principle is the limited number of rights to be granted, in the areas of gambling and radio frequencies it is assumed that the number of authorizations will not be limited, unless certain reasons demand the setting of such a limit. Such reasons are legally rated and their appreciation corresponds to the administrative authority, who will determine in each case the total number of authorizations to be awarded.

51. The examined legal regimes show also the existence of some general principles with which the allocation systems must comply. In the case of radio frequencies, the allocation system should in any event be in accordance with the principles of publicity, concurrence and non-discrimination. The gaming regulation adds to the abovementioned the principles of equality, transparency and objectivity. The regulation of greenhouse gas emission permits refers in general only to the principle of publicity, and establishes for the assignation of rights by means of an auction the principles of free concurrence, transparency, efficiency and non-discrimination.
52. With respect to the allocation procedures used, and except for the greenhouse gas permits allocation system in force up to 2013, the examined regulation designates the methods of the auction and the contest, which are competitive by nature. In this context, objective criteria are established in order to prevent favouritism and nepotism by administrative authorities.
53. Finally, the granting of a limited authorization in the exposed areas is subjected to term, so that after the fixed deadline a new allocation of the respective rights must take place. It is also possible, according to established conditions, the renewal of the granted rights. The limited authorizations are transferable in the areas of greenhouse gases and radio frequencies, but not in the scope of gambling.